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Supreme Court of the United States

OCTOBER TERM, 1906.

No. 129.

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JAMES H. McKENNEY,
Clerk.

The County Commissioners of Wicomico County, Md.
Petitioners

vs.

Samuel Bancroft, Jr.
Respondent.

Supplemental Brief on Behalf of the Petitioners.

JAMES E. ELLEGOOD,
Attorney for Petitioners.

BREWINGTON BROS. CO., 103 Main Street, Salisbury, Md.

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Supplemental Brief on Behalf of the Petitioners.

Relying on the points and authorities in the brief filed with the petition for the Writ of Certiorari, we beg leave to submit some additional authorities and suggestions.

The jurisdiction and the merits of this case depend upon the correctness of the plaintiff's contention that the State of Maryland has passed a law impairing the obligation of a contract between the State of Maryland and the Baltimore, Chesapeake and Atlantic Railway Company, in violation of Sec. 10, Art. I of the Constitution of the United States.—Record, Paragraph XVII of the Bill of Complaint.

This naturally presents two questions: 1. Has the State imposed upon itself "the obligations of a contract?"; and 2. Has the State "passed a law" impairing those obligations?

If there is no contract, or if there has been no law passed by the State impairing its obligations, then there is no case.

The "obligations of a contract" were discussed both by the eminent counsel and the Court in the case of Ogden vs. Saunders, 12 Wheat. 214. Mr. Justice Trimble at page 319 says, these "obligations consist in the

right of the party to demand from the other party what is due———and enforce the performance, or take an equivalent for non-performance". Mr. Justice Washington says, "It is the law which *binds* the parties to perform their agreement". Mr. Chief Justice Marshall speaks of it as "the agreement of the parties, and if it be not illegal, to *bind* them to the extent of their stipulations".

With these definitions and expositions of a contract and its obligations, it is a contradiction to speak of a contract that is not *binding in law;* that can be dissolved or recalled by either party at its pleasure, and leaving no power to enforce it. To speak exactly, there is no revocable or repealable contract. Such an agreement amounts to no more than a revocable license, or privilege.

It is admitted that the Constitution of Maryland, Art. 3, Sec. 48 not only gives the power to revoke this so called contract of exemption, but it also restrains the Legislature from entering into irrevocable agreements with these corporate creations of the State.

It follows, therefore, that the amended Charter of the Baltimore and Eastern Shore Railroad Company, 1886, Chapter 133 of the Acts of Assembly, granting an exemption from taxation has no enforceable legal "obligation",—a privilege only, as long as it lasted, and at the State's pleasure. If this grant has no higher quality, how can the State "impair," speaking in the light of the Constitution, "obligations" which do not exist?

While the Complainant admits that lack of *binding* efficacy, in this alleged contract, upon the State, yet he insists that the State has passed a law impairing "obligations" which are at best not legal, but moral obligations, of which Courts do not take judicial notice.

This law of the State, according to paragraph XVII, page 10 of the Record, lies in the "proposed assessment, levying and collection of taxes by the defendant against the Baltimore, Chesapeake and Atlantic Railway Co., and the ordinance or resolution passed by the defendant, under which the said taxes are to be enforced".

One of two alternatives is at the choice of the Complainant, and the result is the same in either case.

If this be a "law of the State", it is such a law as the State has the power under the Constitution to pass, and is not within the inhibition of

the U. S. Constitution; or if it be not a "law", but an administrative and executive act, on the part of the County Commissioners, then Art. I, Sec. 10 has no application.

If this "proposed assessment" &c. be a "law" of *the State*, the injunction should fail because it is an effort to restrain "proposed" legislation by the State, and also because it is contrary to the Eleventh Amendment, forbidding suits against the State,—Haygood vs. Southern, 117 U. S. 52, holding that, "A bill in Equity does not lie when brought against officers and agents of the State, having no personal interest in the subject matter of the suit". In re Ayers, 123 U. S. at page 504, Mr. Justice Matthews calls attention to the essential difference in a contract between individuals which are protected by the contract clause of the Constitution and a contract between the State and individuals, and declares that "no action will lie against the state or its officers, the object of which is to enforce its performance, or forbid its breach". The effect of an injunction in this case, must be either to compel a performance, or stop a breach of the alleged contract, by the constituted officers of the State in the discharge of so important a function as assessment and levy of taxes.

The case of New Orleans Water Co. vs. La. Sugar Co., 125 U. S. at page 38 explains the conditions under which the jurisdiction of the Federal Court may or may not attach, when the State has passed "a law subsequent" to the contract. Suppose we regard the assessment as a law subsequent to the alleged contract, still the Court of Appeals of Maryland has "decided" to use the language of N. O. Water Co. *supra*, "on grounds independent of that law, that the right claimed was not conferred by the contract and the case stands just as if the subsequent law had not passed".

Whatever we may call this exemption, whether a mere gratuity, or a privilege, or a revocable contract, it existed not as a vested contractual right protected by the Constitution of the United States, but only as a matter of grace growing out of a statute, temporary in its character, because repealable at any time by the State.

In this aspect, it is a state and not a federal question.

Three times has the Court of Appeals of Maryland decided against this immunity claimed—two of which are in the Record in this case, pp. 89-112, and the cases are reported in 89 Md. 98; and 93 Md. 122, render-

ed before this suit was instituted. The third was decided in the case of the B., C. & A. Ry. Co. vs. County Commissioners of Wicomico County, at the January Term, 1906, in the opinion filed Feb. 27, 1906, and reported in the Atlantic Reporter, and will be printed in Vol. 103 of the Maryland Reports.

Judge Schmucker, in reviewing the whole case in an able opinion, refers to the decision of the U. S. Circuit Court of Appeals, now pending before this Court, and says, "We are unable to agree with the conclusion reached that the word 'immunity' as used in Sec. 188, was placed in there 'for the purpose of exempting from taxation all companies which had been granted exemption by the legislature in the first place". He proceeds to say, "In the first place Sec. 187 &c. were intended simply, as they declare on their face, to afford purchasers of railroads and their associates, an opportunity to [illegible] entirely new corporation; secondly, Sec. 188 is silent on the subject of the taxation and the general expressions there used——do not amount in our judgment to the 'clearest and most unambiguous language', or manifest that 'express and clear intention of the law' held to be indispensable to create an exemption from taxation". "Furthermore, the exemption from taxation which was enjoyed by the Baltimore & Eastern Shore R. R. Co., did not rest on *contract*", citing Tucker vs. Furgerson, 89 U. S. 575; West Wis. R. R. Co. vs. Supervisors, 93 U. S. 595; Grand Lodge vs. New Orleans, 166 U. S. 149, fully sustaining the learned Judge's opinion.

"But conceding", says the Court, "for the sake of the argument that the Balto., Chesa. and Atlantic Ry. Co. obtained this exemption, it was repealed by the assessment law of 1896, Chap. 120 ("of the Acts of Assembly of Maryland"). "Our conclusions upon the whole case are" (we give a summary) 1. That the exemption was intended to apply only to the Baltimore & Eastern Shore R. R. Co.; 2. It was not transferable, and did not pass under the mortgage, or "otherwise"; 3. That the Balto., Chesa. and Atlantic Ry. Co. did not acquire this exemption by virtue of Secs. 187 &c. Art. 23.; and 4. If it did acquire this exemption, "It was recalled or extinguished by the Assessment Law, Acts of 1896, Chap. 120".

The authority of the two decisions, rendered before the bringing of this suit and the *ratio decendi* in the case just cited, effectually disposes of the controversy, which is one touching the construction of a state statute and not of constitutional law.

Railroad Cases vs. Gaines, 97 U. S. 697, holding that the decision of the Tenn. Sup. Court "is binding as a construction of the state statute by the highest court of the State".

That case being before this Court on a Writ of Error from the Supreme Court of Tenn., the Court added, "While we are not bound by the decision of the present case—the decision ought not to be over-ruled unless it is clearly wrong. The delicate power which we have, under the Constitution of the U. S. over the judgments of the State Courts ought always to be used with great caution. There should be no reversal of such judgments, unless the error is manifest".

We respectfully submit, whether this Honourable Court, if the last decision of the Court of Appeals of Maryland were before it on Writ of Error, would reverse it on the ground that "the error was manifest", or on the ground that the grant of exemption from taxation to the Balto., Ches. and Atlantic Ry. Co. is "direct" and "specific resting on a contract"; or that it is entitled to it by the clearest and most unambiguous language, or beyond *doubt*, in the face of these decisions of so able a Bench.

When it is admitted that the Legislative Department of a State is sovereign within its sphere and may do as it sees fit, when not restrained by the Constitution, we may ask, is not the Judicial Department, also sovereign within its sphere, entitled to equal consideration, or will it be accorded less dignity and respect for its judicial determinations that do not violate the Constitution, than are given to legislative acts that violate no constitutional principle.

But we submit, in conclusion, that these decisions of the Court of Appeals of Maryland are fully supported by the cases of the Memphis R. R. Co. vs. Berry, 112 U. S. 609; and People vs. Cook, 148 U. S. 397, both of which were decisions in railroad cases, construing re-organization statutes of the States of Arkansas and New York, respectively, containing the word "immunities", under conditions involving similar principles as in the pending case.

Respectfully submitted,

JAMES E. ELLEGOOD,
Attorney for Petitioner.
Deft. below.